UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Pleasanton, CA)

RIGHT AWAY REDY MIX, INC.

Employer

and Case 32-RC-4847

TEAMSTERS LOCAL 853, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

and

RIGHT AWAY PLEASANTON DRIVERS ASSOCIATION

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding[1], the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[1] Briefs filed by the parties have been duly considered.

2. The parties stipulated, and I find, that the Employer is a California corporation with a facility located in Pleasanton, California, where it is engaged in the non-retail production and delivery of sand and gravel. During the past 12 months the Employer has purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of California. In such circumstances, I find the assertion of jurisdiction herein appropriate.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.[2]

4. Petitioner seeks to represent drivers, pumpers and yard persons employed at the Employer's facility located at 501B El Charro Road, Pleasanton, California. The Employer contends that the petition is barred by an agreement, herein also referred to as the Agreement, between the Employer and the Right Away Pleasanton Drivers Association (RAPDA), herein also called Intervenor, covering the drivers. The Petitioner contends that the Agreement is not a bar because it is not a collective agreement, but rather merely a set of identical, individual agreements. In addition, the Petitioner argues that the contract bar doctrine should not be applied in the instant case because the Agreement violates employee rights guaranteed by Section 7 of the Act.

The Employer produces and delivers concrete from four Bay Area facilities including Oakland, Martinez, Union City and Pleasanton. The Pleasanton facility opened in December

[2] During the hearing, the Petitioner argued that the Intervenor is not a labor organization within the meaning of Section 2(5) of the Act. However, the Petitioner made no argument in its brief regarding the Intervenor's labor organization status. Thus, it appears that the Petitioner no longer challenges the application of the contract-bar doctrine based on its initial contention that the Intervenor is not a labor organization. The RAPDA consists of all drivers employed at the Employer's facility. Employees (the drivers) have participated in the "organization," although the only activities in which they have participated have been limited to a handful of meetings with the Employer in order to discuss the terms of their employment contract. Also, RAPDA exists for the purpose of dealing with the Employer concerning working conditions, i.e., negotiating employment Agreements between the drivers and the employees. Thus, I find that the RAPDA constitutes a labor organization within the meaning of Section 2(5) of the Act.

1998 and presently employs 15 employees including 3 office employees, 2 mechanics, 2 painters, 6 drivers, 1 pumper and 1 yardman.[3] When it opened in 1998, the Pleasanton facility hired Alan Rondi and Ken Small from its other Bay Area facilities. Rondi had been employed as a driver out of Oakland and Martinez since about 1990. Small had been employed as a concrete finisher at the Union City facility for about 2 years. The Employer hired a third driver, Ron Capella, within about 2 weeks of opening the Pleasanton facility.

Drivers at the Pleasanton facility have been covered by two Agreements, the first of which was effective from January 20, 1999 to January 19, 2002. The second, and current Agreement, is effective from February 7, 2000 to February 6, 2003. Both Agreements state that "this Agreement is made between Right Away Redy Mix, Inc. ("the Company"); the individual transit mixer drivers, whose names are affixed to the Agreement ("the drivers" or "the employees," depending on the context); and the Right Away Pleasanton Drivers Association ("RAPDA") which has represented the employees in negotiating this Agreement, and which will represent them under its terms. In addition, both Agreements contain a Collective Security Provision which provides that "during the term of this Agreement the Company agrees: that it will not retain in employment any individual beyond thirty (30) calendar days from date of hiring unless said individual signs this Agreement and becomes a member in "good standing" of RAPDA; and that it will not assign any work to any employee who ceases to be a member in "good standing" of RAPDA.[4] After a driver completes their probationary period they automatically become a "member" of the RAPDA.

[3] On December 14, 2000, the Petitioner was certified pusuant to a Board election as the collective bargaining representative in a unit consisting of all full-time and regular part-time mechanics and painters employed at the Employer's Pleasanton facility.

[4] According to Rondi, "member in good standing" means that the employee is trustworthy, comes to work on time, does their job and is honest; and the employees themselves determine whether they are trustworthy. There is no

After the Pleasanton facility opened in 1998, drivers Rondi, Small and Capella discussed a desire among themselves to have a contract similar to the contract covering the Oakland drivers. Small and Capella asked Rondi to speak on their behalf because they were new to the industry, needed guidance and did not know how to negotiate the terms and conditions of their own employment. Rondi agreed to serve as the drivers' spokesperson. Thus, about two or three weeks after the Pleasanton facility opened, Rondi told the Employer's President, David Filipek, that the drivers wanted to negotiate a contract. Thereafter, the Employer arranged a series of meetings with the drivers at its Pleasanton facility.

Present at the first meeting were the three drivers employed at the Pleasanton facility at the time (Rondi, Small and Capella), Pleasanton Plant Manager Dave Bonnell and David Filipek. At this first meeting, drivers suggested that they call themselves the Right Away Drivers Team. However, Filipek objected to the word "Team" so, instead, the drivers called themselves the Right Away Drivers Association. Initially drivers asked to make the same wages as the Oakland drivers but Filipek told Rondi they would never make what Oakland was making since Pleasanton was a new plant and it would not be economical for the Employer. Filipek told the drivers he would have to talk to his partners about what wages he could offer. In addition, the drivers and the Employer agreed that they wanted a three-year contract. The amount of the Employers pension contributions was also discussed. Further, the Employer wanted rotating seniority but the drivers requested and ultimately received straight seniority.

A second meeting with the same participants was held a few days later. The wage rate was agreed upon with the understanding that it could be reviewed in a year in order to determine

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written document that defines what a "member in good standing" is, and, according to Rondi, this determination is left to the Employer's discretion.

whether the Employer could afford to pay more. In addition, drivers requested $2 per hour above their regular wage for training, but ultimately agreed to $.50 cents per hour.

The Employer prepared the first Agreement using language from the contract covering drivers at the Employer's Oakland facility and simply incorporated any differences in the terms for the Pleasanton facility. The Employer distributed a copy of the contract to each of the three drivers and directed them to read it. On January 22, 1999, Filipek and all three drivers signed the first Agreement. Rondi was not authorized to sign on behalf of the other drivers.

About a year later, Rondi asked Bonnell to set up another "driver" meeting with Filipek. Subsequently, a meeting was held at the Employer's Pleasanton facility. The drivers discussed among themselves what they wanted prior to the meeting. Some of the drivers wanted a higher wage increase ($25 per hour) but Rondi informed them that it was not economically sound to ask for so much. Thus, Rondi based their proposal for wages on what other employees were making, and how well the Employer was doing. Rondi also told the drivers that he would ask the Employer to contribute 10 percent for their pensions instead of the 3 percent they were getting at the time.

Four or five of the six drivers were present during the meeting where the terms of the second Agreement were discussed. Bonnell and Filipek were present for the Employer. Rondi served as the drivers' spokesperson. The drivers asked for $20 per hour and a .25 cent per hour increase for every year thereafter. Filipek proposed $18.50 or $18.75 and ultimately the drivers received $19.50 per hour. Rondi also asked for 10 percent pension contributions and ultimately received 8 percent. Drivers also asked for additional vacation and received two extra holidays.

A second meeting was held to distribute the second Agreement, which was identical in substance to the first Agreement with the exception of the modified terms discussed above. The

Agreement was read and drivers were asked whether they agreed and if so to sign the contract. All 6 drivers individually signed the second Agreement, as Rondi was not authorized to sign the Agreement on behalf of the other drivers.

To serve as a bar to an election, a contract must be a "collective" agreement. J.P. Sand & Gravel Co., 222 NLRB 83 (1976). A contract will not bar an election where it is, in reality, a set of identical individual contracts between the employer and each employee who sign the agreement and, therefore, is not a "collective" bargaining agreement. Cal-Western Van & Storage Co., Inc., 170 NLRB 67 (1968). Although the instant Agreement provides that it is between the Employer, the employees and the RAPDA, and certain of its terms were negotiated by an employee spokesperson (Rondi), there is no evidence that the employees intended to be bound as a group by the product of the negotiations. Nor is there evidence that the employer expected them to be so bound. On the contrary, the Employer presented the Agreement to the employees to sign individually and asked them to review it to make sure they agreed with all the terms. The fact that the six employees signed under the heading of RAPDA is unimportant since their signatures had no power to bind the other employees. By its terms, the Agreement requires each employee to individually sign the contract in order to continue working for the Employer beyond 30 days. Filipek described the first Agreement, which is no different in the "collective" sense than the second Agreement, as between himself and the drivers. This conclusion is emphasized by the fact that Rondi serves merely as the "senior driver" and "spokesman," and there is no negotiating agent, grievance agent or other RAPDA official responsible for policing the Agreement. Rather, it is up to the Employer and each individual employee to make sure that the terms of the Agreement are complied with, thus, leading to the inference that any power Rondi had vanished when he conveyed to the Employer certain terms which drivers desired in

their Agreement. See Austin Powder Co., 201 NLRB 566 (1973). In summary, and based on the foregoing, I find that the Agreement cannot be deemed a collective bargaining agreement and, therefore, does not serve as a bar to the instant petition.[5]

6. Based on the foregoing, I find that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

7. The parties stipulated, and I find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers, pumpers and yard persons employed at Employer's Pleasanton, California facility; excluding all other employees including guards and supervisors[6] as defined in the Act.

There are approximately 8 employees in the Unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election[7] to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike

[5] Thus, I find it unnecessary to determine whether the Agreement violates employee rights guaranteed by Section 7 of the Act.

[6] The parties stipulated, and I find, that Plant Manager Robert Amador and Assistant Plant Manager Nick Benedetto are supervisors within the meaning of Section 2(11) of the Act. Accordingly, these individuals are excluded from the unit herein found appropriate.

which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by TEAMSTERS LOCAL 853, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359, 361, fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, 1301 Clay Street, Suite 300 N, Oakland, California 94612-5211, on or before March 2, 2001. No extension of time to file this list shall be granted except in extraordinary

[7] Please read the attached notice requiring that the election notices be posted at least three (3) days prior to the

circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 9, 2001.

DATED AT Oakland, California, this 23rd day of February 2001.

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James S. Scott
Regional Director
Region 32

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election.